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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MONTE L. HANEY, Petitioner, **v.** **DERRAL G. ADAMS, Warden,** Respondent.	C 07-4682 CRB (PR)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

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MONTE L. HANEY, Petitioner, **v.** **DERRAL G. ADAMS, Warden,** Respondent.	C 07-4682 CRB (PR) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS**

STATEMENT OF THE CASE

In 2005, a jury found petitioner guilty of aggravated mayhem, torture, assault by means of force likely to produce great bodily injury, assault with a deadly weapon, corporal injury on a cohabitant, and criminal threats, and found associated great bodily injury and deadly weapon enhancements to be true. 2 CT 425, 436-443.[1/] The trial court sentenced petitioner to life in prison

1. "CT" refers to the State Court Clerk's Transcript, which is contained in Exhibits 1A to 1E filed in support of the Answer. "RT" refers to the State Court Reporter's Transcript of trial proceedings, which is contained in Exhibits 2A to 2Q filed in support of the Answer. "RT [Jury Selection]" refers to the State Court Reporter's Transcript of jury voir dire, which is contained in

with the possibility of parole, plus seven years. 2 CT 482-485.

In 2006, the California Court of Appeal modified the judgment and sentence on the great bodily injury enhancements to comport with the jury's findings, but otherwise affirmed the judgment of conviction. Exh. 5. In 2007, the California Supreme Court denied a petition for review. Exhs. 6, 7. That same year, the California Supreme Court denied a petition for writ of habeas corpus. Exhs. 8, 9.

Petitioner filed the instant federal habeas petition on September 11, 2007. On January 11, 2008, this Court ordered respondent to show cause why the petition should not be dismissed.

STATEMENT OF FACTS

The California Court of Appeal summarized the facts of the case as follows:

A. *People's Case*

> Prior to the time of the incidents in question, appellant had been in and out of jail at least twice, and he and Margie Holmes had an on and off relationship for about nine months. At some point Margie moved in with her grandmother, Eunice Holmes, to care for her, as she was ill. Eunice lived in the Rosa Parks seniors facility on Turk Street in San Francisco. After his most recent release, appellant stayed at the Rosa Parks apartment as well.
>
> When Margie returned from work on June 11, 2002, her grandmother and appellant were at the apartment. Margie had "a really bad feeling" something was going to happen because appellant "was looking very strange." Appellant "had to have marijuana" and "did a lot of" methamphetamine.
>
> Appellant was irritable and said he "nee[ed] some." Margie borrowed $10 from her grandmother and gave it to appellant. Margie believed that appellant left for awhile.
>
> Later that afternoon appellant started walking back and forth between the bedroom and the hallway. He was looking at Margie, with a frightening look. Appellant motioned to her to "come here." Margie was afraid and told appellant "No, you might do something." Appellant persisted, more forcefully. Margie approached appellant and walked past him, toward their bedroom. Just as she reached the room she felt something heavy crash into her head; blood ran down her head. Appellant called her a "bitch" and hit her again on the head. Margie fell to her knees. The pain was excruciating and Margie felt faint. Margie saw a cleaver-like knife in his hand; it came from her grandmother's kitchen. Appellant struck her, splitting open her left eyebrow. Margie pleaded for him to stop, grabbing his leg, but appellant kicked her arm and went back to the kitchen. Margie called to her grandmother. Appellant returned with a much smaller knife and proceeded to stab her again, this time on her right side, and two pokes on the thigh. He

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Exhibits 3A to 3B filed in support of the Answer.

told Margie "I hate you."

Eunice came in and started screaming for appellant to leave her granddaughter alone. Appellant told her, "Mama, if you don't give me any money, I'm going to kill this bitch." Eunice said she didn't have any money. Margie knew her grandmother kept money in her bra and begged her to give appellant some money. Margie collapsed. Eunice fled to enlist help from the security guard, Zaid El-Amin. El-Amin contacted Kenneth Babb, the manager.

Appellant straddled Margie and told her "I'm going to kill you, bitch." He grabbed her hair, pulled her head to the right and held her neck so she could not move. Appellant put his hand in her left eye and "started to dig in it," "started pulling it out," saying, "I've got to get it. I've just got to get it." Margie could feel her eye "just jingling back and forth" from her cheek. Appellant repeated that he was going to kill her. Margie felt a tremendous amount of pressure as appellant was pulling out her eye, then heard something "snap" and knew her eye was gone. She blacked out.

When she came to, appellant was still in the room. Margie tried to remain still so appellant would think she was dead. Eventually she no longer heard footsteps. Crawling out of the bedroom, Margie saw her eye, "still wriggling." She grabbed it, then called her mother and 911. Margie was taken by ambulance to San Francisco General Hospital.

Meanwhile, Babb was rushing with Eunice to her apartment on the fourth floor. He asked El-Amin to call the police. Babb passed appellant by the elevator; he was walking very calmly. As El-Amin reached for the phone, appellant touched the receiver and said, "[Y]ou don't have to call the police dog, I'm gone, I'm leaving." He looked "a little amped" from a domestic dispute, but not hysterical like Eunice. El-Amin did not think the situation was "too bad" and thus did not follow appellant as he walked out of the building.

The emergency room physician was not able to reattach Margie's eye because the optic nerve had been severed. He testified that it would take "considerable force" to remove an eye. Margie also suffered two stab wounds to the right flank, two to the right thigh, an eyelid laceration and a forehead laceration.

Margie's mother rushed to the hospital. There, she received a call from appellant. After asking how Margie was doing, he said, "I'm going to kill that bitch."

The police arrested appellant the next day. He told the police that he and Margie had been smoking crack and drinking beer. They got into an argument and he left when Eunice asked him to leave. He denied that anything happened and claimed to have blacked out. Appellant said he had been high on speed and crack for seven or eight days. He claimed there was something wrong with Margie and said she smoked a lot of crack.

B. *Defense*

Appellant presented a mental disease defense based on the testimony of three experts.

Psychiatrist Amen conducted two SPECT[2/] brain scans on appellant in August 2004. These scans look at brain blood flow and activity. Dr. Amen concluded that appellant had overall decreased activity in the brain, and the condition worsened when appellant

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2. SPECT stands for single photon emission computed tomography.

concentrated. Dr. Amen believed appellant had trauma to his brain in the past, and probably toxic exposure that starved the neurons of oxygen. Toxic exposure could result from drug abuse, working in toxic environment, infection, near drowning, etc. Dr. Amen characterized appellant's brain as "clearly dysfunctional and damaged." Significant decreased activity as found in appellant's scans normally is associated with problems with judgment, impulse control, organization, planning and empathy. Appellant's brain would have looked "significantly worse" had the scan been conducted at the time of the incidents, due to lack of sleep and heavy drug use.

Neuropsychologist Young performed a series of psychological and neuropsychological evaluations of appellant. Appellant cooperated fully and there were no indications that he was malingering or faking his responses. Dr. Young concluded that appellant's intellectual functioning was in the borderline range. He suffered significant impairment of the temporal and frontal lobes, and the impairment affected all the brain areas. The functions associated with attention and concentration, memory and learning, and executive functioning were found to be "the most impaired." Studies have shown that impaired frontal lobe functioning is a predictor for violence.

Dr. Smith, a specialist in addiction medicine, also evaluated appellant. According to Dr. Smith, the earlier onset of addiction, the more brain impairment occurs. Appellant reported to Dr. Smith that his father started giving him alcohol and marijuana at the age of seven. He began smoking crack cocaine at 15 and shortly thereafter started using methamphetamine, his drug of choice.

Appellant also related that upon his release from prison on June 2, 2002, he began smoking high doses of methamphetamine, with minimal sleep. Over the course of this speed run, appellant's brain became more progressively impaired and he experienced some characteristics of amphetamine psychosis, including paranoia and "ideas of reference." However, Dr. Smith opined that appellant's violent outburst resulted from a high-dose, methamphetamine-induced rage overreaction to an actual sensory event; it was not a total delusion.

C. *Rebuttal*

Clinical neuropsychologist Lynch found fault with some of Dr. Young's testing and the results. He also stated from his review of Dr. Young's evaluation that he would not have ruled out the possibility that appellant had an antisocial personality disorder.

Neurologist Cassini testified that he did not believe SPECT scans were very useful in evaluating cognitive impairment or brain trauma. Further, he questioned whether Dr. Young had the best information about his background at the time of the evaluation, and believed that appellant's poor education, and the absence of challenges, training, and work experiences throughout his life could account for the test results. "You don't have to give him brain damage or . . . some kind of disease process to explain" "why he's functioning the way he is." Additionally, Dr. Cassini also noted that there was no mention of brain damage in appellant's medical or prison records. Further, he challenged Dr. Young's conclusions, from the tests administered, that appellant had frontal lobe damage and was more prone to blacking out.

D. *Surrebuttal*

Dr. Young defended all the tests she used, testifying that they were valid, reliable and accepted within the neuropsychological community.

Exh. 5 at 2-6.

STANDARD OF REVIEW FOR FEDERAL HABEAS PETITIONS BROUGHT BY STATE PRISONERS

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which imposes a "highly deferential" standard for evaluating state court rulings and "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). Under AEDPA, the federal court has no authority to grant habeas relief unless the state court's ruling was "contrary to, or involved an unreasonable application of," clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1). A decision constitutes an unreasonable application of Supreme Court law only if the state court's application of law to the facts is not merely erroneous, but "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Thus, "[o]nly if the evidence is 'too powerful to conclude anything but' the contrary" should the court grant relief. *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005)). The petitioner bears the burden of showing that the state court's decision was unreasonable. *Visciotti*, 537 U.S. at 25.

ARGUMENT

I.

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON AGGRAVATED ASSAULT AS A LESSER INCLUDED OFFENSE OF TORTURE DID NOT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS

Petitioner contends that the trial court's refusal to instruct the jury on aggravated assault as a lesser included offense of torture violated his right to due process. Petition at 6. However, because aggravated assault is not a lesser included offense of torture under California law, the trial court had no duty to so instruct the jury.

A. Trial Court Proceedings

During a discussion of jury instructions, defense counsel asked the court to instruct the jury

on assault with force likely to produce great bodily injury as a lesser included offense of torture. 14 RT 982. Defense counsel cited no authority for such instruction. 14 RT 982. The court denied the requested instruction, noting, "[T]he elements for torture don't appear to have included within them the elements for a 245(a) assault, so first blush and a first reading it doesn't appear to me that that would be a lesser to torture." 14 RT 982.

The next day, the court revisited the issue after defense counsel cited *People v. Martinez*, 125 Cal. App. 4th 1035 (2005) in support of the requested instruction. 15 RT 1005-1006. The court found that *Martinez* did not mandate the instruction. 15 RT 1008-1009.

B. California Court Of Appeal Opinion

The California Court of Appeal concluded that, under state law, aggravated assault is not a lesser included offense of torture because "the statutory elements of torture do not include all the elements of an aggravated assault." Exh. 5 at 8. The appellate court concluded that the trial court was therefore not required to give the requested instruction. Exh. 5 at 6.

C. The Court Of Appeal Reasonably Concluded That The Trial Court Had No Duty To Instruct On Aggravated Assault As A Lesser Included Offense Of Torture

The state court's conclusion that aggravated assault is not a lesser included offense of torture as those offenses are defined in California constitutes a determination of a state law question that cannot be revisited by this Court. *See Stanton v. Benzler*, 146 F.3d 726, 728 (9th Cir. 1998) (the state is free to define the elements of a particular offense, and a state court's determination of what constitutes an element of that offense is not open to challenge on habeas review); *see generally Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Mendez v. Small*, 298 F.3d 1154, 1158 (9th Cir. 2002) ("A state court has the last word on the interpretation of state law."). Because petitioner's entire argument is based on his interpretation of state law, his claim is not cognizable on federal habeas.

Even if the state court had not rejected the contention that aggravated assault is a lesser included offense of torture, this Court could still not reach the merits of petitioner's claim. "'Under

the law of this circuit, the failure of a state trial court to instruct on lesser included offenses in a non-capital case does not present a federal constitutional question.'" *Solis v. Garcia,* 219 F.3d 922, 929 n.7 (9th Cir. 2000) (quoting *Windham v. Merkle*, 163 F.3d 1092, 1106 (9th Cir. 1998)). In addition, there is no clearly established Supreme Court authority requiring such instructions; the Supreme Court has held only that a defendant may be entitled to lesser included instructions in a capital case, and has expressly declined to decide whether that holding extends to non-capital cases. *Beck v. Alabama,* 447 U.S. 625, 638 n.14 (1980). The Supreme Court's reservation of an issue demonstrates that the law is not "clearly established" for purposes of 28 U.S.C. § 2254(d). *Alberni v. McDaniel*, 458 F.3d 860, 863-867 (9th Cir. 2006). Further, because the circuit courts are split as to whether *Beck* applies to non-capital cases, habeas relief is precluded under the doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). *Turner v. Marshall,* 63 F.3d 807, 819 (9th Cir. 1995), overruled on other grounds in *Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999). And the Constitution clearly does not require instructions on lesser *nonincluded* offenses. *See Hopkins v. Reeves*, 524 U.S. 88, 96-97 (1998).

Finally, even assuming petitioner could overcome the two hurdles discussed above, he cannot meet his burden under 28 U.S.C. § 2254(d) to show that the state court's decision was objectively unreasonable. *See Middleton v. McNeil*, 541 U.S. 433, 438 (2004) (per curiam). A claim of state instructional error can be the basis of federal habeas relief only if the error, considered in light of all the instructions given in addition to the trial record, "'so infected the entire trial that the resulting conviction violates due process.'" *Estelle v. McGuire,* 502 U.S. at 72 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). The test for constitutional error is whether there is a "reasonable likelihood" the jury misapplied the instructions. *Id.* The jury in this case convicted petitioner of both aggravated assault and torture. The jury therefore necessarily found the elements of both offenses to be satisfied beyond a reasonable doubt. Moreover, because the jury was instructed on both offenses, it was not forced into an all or nothing choice in this case. Accordingly, there is no reasonable likelihood the omission of the lesser included offense instruction affected the jury's verdict. Further, because the jury found petitioner guilty of both aggravated assault and

torture, any error was harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). *Fry v. Pliler*, 127 S. Ct. 2321, 2328 (2007).

II.

THE PROSECUTOR DID NOT EXERCISE HIS PEREMPTORY CHALLENGES IN A RACIALLY MOTIVATED MANNER

Petitioner contends that the prosecutor used his peremptory challenges to exclude all African Americans from the jury. Petition at 6. Petitioner, however, has failed to state a viable claim. In any event, the record does not support petitioner's contention.

A. Jury Voir Dire Proceedings

The prosecutor exercised nine peremptory challenges during voir dire. 2 RT [Jury Selection] 203-204, 214-215, 255-257, 272. Defense counsel did not object to any of the prosecutor's challenges.

B. The California Supreme Court Reasonably Rejected Petitioner's Claim Of Prosecutorial Misconduct

The United States Constitution prohibits the use of a peremptory challenge of a juror based solely on race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). A *Batson* claim requires a three-step inquiry. *Rice v. Collins*, 546 U.S. 333, 338 (2006). First, the defendant must make a prima facie showing that a challenge was based on race. *Id.* Second, the prosecutor must give a race-neutral reason for the challenge. *Id.* Third, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.*

As a threshold matter, we note that it is well-settled that "[c]onclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief." *James v. Borg*, 24 F.3d 20, 26 (9th Cir.1994). Here, petitioner contends that the prosecutor used his peremptory challenges to exclude "all African Americans" from the jury, Petition at 6, but does not identify which jurors he claims the prosecutor challenged on racial grounds or make any reference to the record. The claim is difficult to address on the record alone because defense counsel did not object to the prosecutor's exercise of his peremptory challenges, the trial court did not conduct the three-

step inquiry set forth above, and it is impossible to discern the race of the jurors challenged by the prosecutor from the jury voir dire transcripts or the challenged juror questionnaires. The claim should accordingly be dismissed for lack of specificity. *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995).

Even if this Court declines to dismiss the claim for lack of specificity, we submit that sufficient race-neutral reasons support all of the prosecutor's peremptory challenges, and that a prima facie case of discrimination cannot be established by petitioner.

Race-neutral reasons for the prosecutor's peremptory challenges are apparent for all of the jurors challenged by the prosecutor. For instance, many jurors had backgrounds in, or familiarity with, illegal drug use, mental illness, or the mental health or medical fields, which raised the concern that they might be more accepting of a mental defense based on heavy drug use. J.B.(1) had a friend in college who was a heroin addict and died from an overdose; thought it was "hard to say" how the experience might affect his ability to be fair; and believed "you can't really judge" people who are addicted to drugs because the drugs make them lose control.[3/] *See* Exh. 4A at 5-6 [question 20(a) & (e)]. J.K. was a graduate student at UCSF who researched psychological disorders; had a mother with a drug problem; had a stepfather with a mental disorder; had himself been to a psychologist; believed psychologists and psychiatrists were helpful; and might tend to believe the testimony of such experts. *See* Exh. 4B at 2, 5-7 [questions 1, 20, 23- 27]. R.G. had been arrested in the past for public intoxication; had friends who were addicted to crystal meth; thought people on crystal meth could not think clearly; believed people on drugs needed help; had sympathy for drug users that might affect his ability to be fair; had a sister with a mental illness who had seen several psychiatrists in the past; thought it was "very important" to hear from experts on a mental defense; and believed leniency should be given to an accused "if a mental state of insanity is obvious." Exh. 4D at 3-5 [questions 9-10, 14, 16, 20-22, 24-27, 30]. W.N. had degrees in physics and biomedical engineering;

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3. We refer to the challenged jurors by their first and last initials in order to preserve their privacy. Because two of the challenged jurors have the same initials, we will refer to them as J.B.(1) and J.B.(2).

was an assistant research physicist at UCSF; worked on developing surgical devices; had a former roommate who was a drug user and did not know how that experience might affect his ability to be fair; was friends with a neurologist, psychologist, and psychiatrist; and was "very familiar" with brain imaging, or spectrometry. 1 RT [Jury Selection] 87-88, 116-117; Exh. 4F at 2, 5 [questions 1, 5, 20]. J.D. and J.B.(2) were social workers who had provided psychiatric counseling in the past and were familiar with substance abuse issues. 2 RT [Jury Selection] 144-145, 248; Exh. 4G at 2, 6 [questions 2, 23]; Exh. 4H at 6 [question 23]; *see United States v. Thompson*, 827 F.2d 1254, 1260 (9th Cir. 1987) (a juror's occupation constitutes a race-neutral reason for a peremptory challenge). In addition, J.D. had consulted with a psychologist or psychiatrist in the past for depression; thought that the testimony of such professionals could be valuable in evaluating a mental defense; thought she might be more attuned to such testimony as a mental health professional herself; and knew one of the mental health experts who would be testifying on behalf of the defense. 2 RT [Jury Selection] 145; Exh. 4G at 7, 10 [questions 24-27, 39]. J.B.(2) had been arrested in the past for possession of marijuana; had seen a psychiatrist for an addiction to speed; thought he might be biased because of his past drug use; and believed he "would probably side with psychologists or psychiatrists about a mental illness or impairment suffered by the accused." 2 RT [Jury Selection] 248; Exh. 4H at 4-7 [questions 14, 20-22, 25, 27]. And finally, S.M. had been treated by a psychiatrist in the past for mental illness. Exh. 4I at 7 [questions 24-25].

Many of the challenged jurors also gave indications that they might be biased against the prosecution. J.K., M.C., and S.M. had family members who had been arrested or prosecuted for committing crimes. 1 RT [Jury Selection] 63, 85; 2 RT [Jury Selection] 254-255; *see also* Exh. 4E at 4 [question 14]; Exh. 4B at 4 [questions 14-15]; Exh. 4I at 4 [question 14]; *United States v. Vaccaro*, 816 F.2d 443, 457 (9th Cir. 1987), overruled on other grounds by *Huddleston v. United States*, 485 U.S. 681 (1988) (challenging a juror based on family member's contact with the criminal justice system proper); *see also United States v. Smith*, 223 F.3d 554, 569 (7th Cir. 2000) (prosecutor in drug trial gave nondiscriminatory reason for striking juror whose brother had been prosecuted for drugs). I.S., R.G., and W.N. were all victims of crime, with I.S. and R.G. reporting having negative

experiences with the police, and W.N. indicating that the police never arrested anyone in his case and that he did not know if the incident would cause him to be biased. 1 RT [Jury Selection] 66, 69, 74-75; Exh. 4C at 3-4 [questions 10, 15]; Exh 4D at 4 [question 15]; Exh. 4F at 4 [question 15]. Additionally, R.G. thought he might distrust a police officer's testimony because he felt that police officers were biased, and W.N. felt that the crime rate in San Francisco was "very high" and might cause him to be biased. Exh. 4D at 3 [question 9]; Exh. 4F at 5 [question 18]; *see Mitleider v. Hall*, 391 F.3d 1039, 1048 (9th Cir. 2004) (prosecutor's concerns of bias toward law enforcement valid basis for challenge). Further, R.G. thought the judicial system was unfair and biased, while J.B.(2) felt that some conduct should not be classified as criminal and that his feelings might cause him to be biased. 1 RT [Jury Selection] 69-70; Exh. 4D at 9 [question 36]; Exh. 4H at 5 [question 18]; *see Tolbert v. Gomez*, 190 F.3d 985, 989 (9th Cir. 1999) (challenging a juror based on his expressed opinion of the judicial system does not violate *Batson*). Moreover, R.G. was a supporter of several prisoners' rights organizations. Exh. 4D at 5 [question 17].

Finally, a couple of the challenged jurors had race-neutral issues that made them less than ideal candidates for sitting on a jury. M.C. had trouble understanding some of the questions on the juror questionnaire but could not articulate what she did not understand, raising the concern that she might have trouble understanding the trial proceedings and communicating her views during deliberations. 1 RT [Jury Selection] 109-110. And I.S. got migraines if she sat for too long, raising the concern that she might be unable to focus on the trial if she developed a migraine during the proceedings. 1 RT [Jury Selection] 114-115; Exh. 4C at 9 [question 36].

In sum, the record reveals legitimate race-neutral reasons for challenging all of these jurors, and petitioner cannot make out a prima facie case of discrimination. Accordingly, petitioner has failed to satisfy his burden of proving his *Batson* claim.

III.

TRIAL AND APPELLATE COUNSEL WERE NOT INEFFECTIVE

Petitioner contends that trial counsel was ineffective for failing to object to the

prosecutor's use of peremptory challenges to exclude all African Americans from the jury. Petition at 6. He further contends that appellate counsel was ineffective for failing to argue that petitioner was improperly convicted of five offenses for one course of conduct. Petition at 6. There is no merit to either of these claims.

A. Standard Of Review For Claims Of Ineffective Assistance Of Counsel

In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, he would have received a more favorable result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The *Strickland* standard applies to claims of ineffective assistance of appellate counsel as well as trial counsel. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). On federal habeas, a petitioner must show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (per curiam).

"There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts— often to as little as 15 minutes—and when page limits on briefs are widely imposed." *Jones v. Barnes*, 463 U.S. 745, 752-753 (1983). "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Id.* at 751-752; *accord, Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) ("the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy"). Thus, "it is still possible to bring a *Strickland* claim based on [appellate] counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent." *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

B. The State Court Reasonably Rejected Petitioner's Claim Of Ineffective Assistance Of Trial Counsel

Petitioner contends that defense counsel should have raised a *Batson* objection to the

prosecutor's use of peremptory challenges to exclude all African Americans from the jury. However, as noted above in Argument II, sufficient race-neutral reasons existed for all of the jurors challenged by the prosecutor. As counsel cannot be faulted for not making a futile objection, petitioner's claim of ineffective assistance of counsel necessarily fails. *See Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir.1999) (to show prejudice under *Strickland* from failure to file a motion, petitioner must show that (1) had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious, and (2) had the motion been granted, it is reasonable that there would have been an outcome more favorable to him); *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir.1996) (failure to take futile action can never be deficient performance).

C. The State Court Reasonably Rejected Petitioner's Claim Of Ineffective Assistance Of Appellate Counsel

Petitioner contends that appellate counsel was ineffective for failing to argue that petitioner was improperly convicted of five offenses for one course of conduct. We note, however, that counsel did raise this argument on appeal with respect to two of petitioner's convictions: aggravated assault and torture. In rejecting the argument, the California Court of Appeal noted the following:

> In California, a single act or course of conduct by a defendant can result in multiple convictions. (§ 954; *People v. Pearson* (1986) 42 Cal. 3d 351, 354.) Citing the judicially created exception to this rule which prohibits multiple convictions based on necessarily included offenses (*People v. Reed* (2006) 38 Cal. 4th 1224, 1227), appellant urges that we strike his conviction for aggravated assault as necessarily included within the torture conviction. Aggravated assault is not a lesser included offense of torture and thus we will not strike the former conviction.

Exh. 5 at 9.

Given California's rule that a single course of conduct can result in multiple convictions except in the case of necessarily included offenses, appellate counsel was not ineffective for not making this argument with regard to all five of petitioner's convictions. *See Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002) (the failure to raise untenable claims on appeal does not constitute ineffectiveness). Moreover, given California's rule that a defendant may sustain multiple convictions for one course of conduct, petitioner cannot show any prejudice arising from counsel's performance.

CONCLUSION

Accordingly, respondent respectfully requests that the petition for writ of habeas corpus be denied.

Dated: July 24, 2008

Respectfully submitted,

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